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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

TAVARES LONDELL MCINTOSH,

Defendant and Appellant.

B286706

(Los Angeles County
Super. Ct. No. KA115353)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert M. Martinez, Judge. Affirmed and remanded with directions.

Megan Hailey-Dunsheath, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

In an information filed by the Los Angeles County District Attorney's Office, defendant and appellant Tavares Londell McIntosh was charged with 12 counts of robbery (Pen. Code, § 211; counts 2-3, 5-13, 15),¹ one count of escape (§ 4532, subd. (b)(1); count 4), and one count of attempted robbery (§§ 211/664; count 14). As to all counts, it was alleged that defendant personally used a firearm (§ 12022.53, subd. (b).) It was further alleged that defendant had a prior "strike" conviction within the meaning of the "Three Strikes" Law (§§ 667, subd. (d), 1170.12, subd. (b)), as well as a prior serious felony conviction (§ 667, subd. (a)(1)).

The trial court granted defendant's motion for judgment of acquittal (§ 1118.1) with respect to count 4. A jury found defendant guilty as charged on all remaining counts, although the firearm allegations were found to be not true. Defendant admitted the prior conviction allegations. He was sentenced to a total of 38 years 4 months in state prison, including a five-year enhancement in state prison pursuant to section 667, subdivision (a)(1).

Defendant timely filed a notice of appeal. He argues that one of his robbery convictions (count 7) must be reversed due to insufficient evidence. Specifically, he claims that the prosecution failed to present evidence that the victim, James Navarez (Navarez), experienced fear, principally because Navarez did not testify at trial. In his supplemental brief, defendant argues that this case must be remanded to the trial court so that it can

¹ All further statutory references are to the Penal Code unless otherwise indicated.

exercise its newly-authorized discretion to strike or impose the five-year enhancement for the prior serious felony conviction.

We agree with defendant that the matter must be remanded for resentencing. As the parties agree, the trial court must be given the opportunity to exercise its newly-authorized discretion to strike the enhancement imposed pursuant to section 667, subdivision (a)(1). (Sen. Bill No. 1393 (2017-2018 Reg. Sess.) (SB 1393).) In all other respects, we affirm the judgment.

FACTUAL BACKGROUND²

On April 12, 2017, Erika Leanos (Leanos), Paulina Delgado (Delgado), Chris Martinez (Martinez), and Navarez were working at a Little Caesar's pizza restaurant in Pomona. At around 3:00 p.m., the four employees were making pizzas. Leanos turned to look into the lobby and saw a man hiding behind a wall. She was unable to see his face, as it was covered with something black. The man pointed a gun at her. Leanos gasped, which prompted her three coworkers to turn and see the gunman. The four employees then ran out of the restaurant through a back door and called the police.

Delgado testified that her three coworkers were closer to the back door when the robber entered the store. She saw her three coworkers begin to run before she turned to see a man holding a gun. The gunman told her to open the register. Delgado then followed her coworkers in running out the back

² Defendant committed a series of robberies at multiple locations, leading to his conviction of 12 counts of robbery and one count of attempted robbery. Because he only challenges one of his robbery convictions (count 7), we set forth the facts as to that crime only.

door. As Delgado ran away, she heard the gunman tell them to come back and open the register.

Martinez testified that while inside the store, he saw only the tip of a gun being held by someone who was standing around the corner. Martinez heard the gunman say, “Give me the money.” Martinez was afraid. He and his coworkers all ran out the back door.

Once outside the store, Leanos saw the gunman run out of the restaurant with a cash register. Martinez saw a person dressed in all black and wearing black boots run out of the restaurant’s front door while carrying a cash register. When Leanos later went back inside the restaurant, one of the cash registers was missing.

While outside the restaurant, an unidentified person approached Leanos and showed her a photograph of a license plate number on a cell phone. Using her own cell phone, Leanos took a photograph of the photograph and later showed it to police.

About three to four hours after the robbery, a silver BMW with a license plate number similar to the suspect’s vehicle was stopped by police officers in Pomona. Defendant was the front passenger of the car. He stated that the car belonged to him. The driver of the BMW did not match the physical description of the robber. A search of the car revealed various items of clothing that were consistent with the clothing worn by the robbery suspect, as seen in the surveillance video from the robbery at Little Caesar’s.

DISCUSSION

I. *Substantial evidence supports defendant's robbery conviction (count 7)*

Defendant contends that there was insufficient evidence to support his robbery conviction in count 7 because there was no proof that the named victim, Navarez, experienced fear.

A. Standard of review and applicable law

In reviewing a challenge to the sufficiency of the evidence, the appellate court must examine the record, the findings of fact, and reasonable inferences from the evidence in the light most favorable to the judgment, and affirm the judgment if any rational trier of fact could have found guilt beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318–319; *People v. Whisenhunt* (2008) 44 Cal.4th 174, 200.) We do not reweigh the evidence or reevaluate the credibility of the witnesses. (*Ibid.*)

“Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.” (§ 211; *People v. Lindberg* (2008) 45 Cal.4th 1, 24.) By the plain terms of the statute, the perpetrator need not use force and fear; “either force or fear is sufficient.” (*People v. Borra* (1932) 123 Cal.App. 482, 484.) The requisite force or fear includes “forcing or frightening a victim into leaving the scene, as well as simply deterring a victim from preventing the theft or attempting to immediately reclaim the property.” (*People v. Flynn* (2000) 77 Cal.App.4th 766, 771.) And the threat of force or fear need not be express; it may be implied from the circumstances. (*People v. Cuevas* (2001) 89 Cal.App.4th 689, 698; *People v. Brew* (1991) 2 Cal.App.4th 99, 104.)

B. Analysis

Here, even though Navarez did not testify at trial, there was ample evidence establishing that he experienced fear. His three coworkers all testified about the robbery. Leanos testified that she was working that afternoon with Navarez. The four employees were in the same general area, preparing pizzas, when Leanos first saw the robber. Leanos gasped, prompting her three coworkers, including Navarez, to turn and see the gunman. The four employees, including Navarez, then ran out of the back door and called the police.

Martinez testified that he saw the tip of a gun, and he heard the person holding the gun make a demand for money. He was afraid and ran out the back door, along with his three coworkers, including Navarez.

And, Delgado testified that her three coworkers (again, including Navarez) ran toward the back door before she did. After she saw the gunman, she followed her coworkers in running out the door.

Under these circumstances, there was ample evidence from which the jury could have inferred that Navarez ran out the back door because he experienced fear. (*People v. Holt* (1997) 15 Cal.4th 619, 690 [fear may be inferred from the circumstances in which the property is taken].) It does not matter that Navarez may not have actually seen the man with the gun. He was working in the same general area as his coworkers. And, according to Leanos, her gasp after seeing the gunman prompted her coworkers to turn and run. There was simply no logical reason other than fear for Navarez to have suddenly left his work station and flee through the back door with his coworkers.

II. The matter must be remanded for the trial court to exercise its discretion to strike defendant's serious felony enhancements pursuant to SB 1393

Under the law that existed at the time of defendant's sentencing, trial courts had no authority to strike a prior serious felony conviction in connection with the imposition of a five-year enhancement under section 667, subdivision (a)(1). (§ 1385, subd. (b); *People v. Valencia* (1989) 207 Cal.App.3d 1042, 1045–1047.) SB 1393, effective January 1, 2019, changed the law, now giving judges that discretion.

Defendant requests that, pursuant to SB 1393, his case be remanded so that the trial court can have the opportunity to exercise its discretion to strike or impose the previously mandatory enhancement. The People agree.

We agree with the parties that the matter must be remanded to the trial court so that it can exercise its discretion to strike or impose the previously mandatory five-year enhancement under section 667, subdivision (a)(1). (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971–973.)

DISPOSITION

The matter is remanded for resentencing on count 2 pursuant to section 667, subdivision (a), as amended by SB 1393. In all other respects, the judgment is affirmed.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ